125 (3)

No. 08-731

Supreme Court, U.S.
FILED
APR 7 - 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SALVADOR MAGLUTA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

Bruce Rogow
BRUCE S. ROGOW, P.A.
500 E. Broward Blvd.
Suite 1930
Fort Lauderdale,
FL 33394

Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
1201 Third Street
Suite 2200
Seattle, WA 98101
(206) 622-3150

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

I. This Court Should Confirm That Collateral Estoppel Requires Analysis Of The *Actual* Evidence Adduced At A Trial Following A Prior Acquittal. 1

II. The Continued Vitality of *United States v. Watts* Merits This Court's Review 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Agostini v. Felton, 521 U.S. 203 (1997) 9
Aleman v. Honorable Judges of the Circuit Court, 138 F.3d 302 (7th Cir. 1998) 8
Alvarado v. United States, 497 U.S. 543 (1990) (per curiam) 5
Ashe v. Swenson, 397 U.S. 436 (1970) 2, 6, 8
Blakely v. Washington, 542 U.S. 296 (2004) 10
Burks v. United States, 437 U.S. 1 (1978) 7
Diaz-Albertini v. United States, 498 U.S. 1061 (1991) 5
Stutson v. United States, 516 U.S. 193 (1996) (per curiam) 5
United States v. Booker, 543 U.S. 220 (2005) 10, 11
United States v. Brown, 983 F.3d 201 (11th Cir. 1993) 2, 3
United States v. Garcia, 78 F.3d 1517 (11th Cir. 1996) 2, 3
United States v. Scott, 437 U.S. 82 (1978) 7
United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008) 10
United States v. Watts, 519 U.S. 148 (1997) (per curiam) 10, 11
United States v. White, 551 F.3d 381 (6th Cir. 2008) (en banc), *pet'n for cert. pending* (No. 08-9523) 10

Docketed cases:

Bobby v. Beis, No. 08-598 5
Yeager v. United States, No. 08-67 5

Statutes:

18 U.S.C. § 3553 11
28 U.S.C. § 2106 4

REPLY BRIEF FOR THE PETITIONER

The government seems to believe that Petitioner was a "prolific and notorious drug trafficker[]," and that he was even involved in various clandestine murders and malfeasance. BIO 1, 4. The problem with these incendiary allegations is that the government has never proven them to a jury in a court of law. Nonetheless, the government has persisted in the face of acquittal after acquittal to seek to use a handful of relatively minor money laundering convictions to punish Petitioner for all of these purported acts.

The Eleventh Circuit's decision condoning such a prosecution and sentence shows that it is time for this Court to straighten out the law concerning the effect of acquittals. Criminal prosecutions should stand or fall on the facts that prosecutors prove (or fail to prove) to juries, not on prosecutors' after-the-fact attempts to conjure hypothetical scenarios or to tar defendants with unproven allegations. The government's use of acquitted conduct has tainted Petitioner's convictions and sentence, and this Court should not allow them to stand.

I. This Court Should Confirm That Collateral Estoppel Requires Analysis Of The *Actual* Evidence Adduced At A Trial Following A Prior Acquittal.

The government makes no attempt to defend the Eleventh Circuit's holding that a purely hypothetical explanation for a guilty verdict at a second trial can avoid the collateral estoppel effect of a prior acquittal. If anything, the government's brief implicitly agrees

with Petitioner that such a rule transgresses *Ashe v. Swenson*, 397 U.S. 436 (1970), and conflicts with the decisions of other Courts of Appeals and the high courts of several states, *see* Pet. for Cert. at 13-24.

The government nevertheless urges this Court to deny review for three reasons: (1) the Eleventh Circuit's holding permitting the government to avoid the preclusive effect of Petitioner's prior acquittal by positing facts completely unsupported by the record does not *really* represent the law in the Eleventh Circuit; (2) there are two alternative grounds on which the Eleventh Circuit could have rejected Petitioner's collateral estoppel argument; and (3) the issue does not arise with sufficient regularity. None of these arguments supplies a valid reason for declining to reverse the Eleventh Circuit, at least by means of a limited grant-vacate-and-remand or summary reversal.

1. The Eleventh Circuit's holding is readily apparent. The court explained in no uncertain terms that in order for the government to be collaterally estopped from pursuing a subsequent prosecution, the defendant must:

> establish that the elements of the crime on which the prior acquittal was based are also essential elements of the crime for which he was convicted at the second trial. *See* [*United States v. Garcia*, 78 F.3d 1517, 1521 (11th Cir. 1996); *United States v. Brown*, 983 F.3d 201, 202 (11th Cir. 1993)]. That is to say, [Petitioner] must show that the elements of the drug offenses which led to

> his acquittal in the 1996 trial are essential elements of the money laundering offenses for which he was convicted in this case.

Pet. App. 23a. It is undisputed that the government never introduced any evidence of narcotics activity that had not already been resolved in Petitioner's favor by the jury in the 1996 trial. Thus, in the Eleventh Circuit, so long as the government *could have* proved its case using non-acquitted conduct—irrespective of whether it actually did—collateral estoppel is inapplicable. All that matters in this respect is a hypothetical comparison of the elements of the crimes in the two prosecutions.

The government's protestation that the Eleventh Circuit's decisions in *Garcia* and *Brown* require courts, in addition to comparing the elements of prior and present charges, to "look beyond the abstract definitions of the elements to be proved and consider the actual facts" established at the second trial (BIO 20-21) is thus irrelevant. The point here is that the decision below, just like *Garcia* and *Brown*, holds that it is not enough for a defendant to satisfy that "actual facts" test. In the Eleventh Circuit, unlike almost every other court to address the issue, a defendant who satisfies the "actual facts" test must "'*also*'" show that the government could not have proven the elements of the charge at the second trial even with a hypothetical set of different facts. Pet. App. 22a (quoting *Garcia*, 78 F.3d at 1521) (quoting in turn *Brown*, 983 F.2d at 202) (emphasis added). The petition for certiorari asks this Court to address the propriety of this extra requirement that the Eleventh

Circuit imposes on defendants, and the government offers no defense for that requirement.[1]

2. Neither of the government's alternate arguments for sustaining the Eleventh Circuit's decision justifies foregoing review of it. For starters, it is disingenuous for the government now to rely exclusively on alternative grounds for rejecting Petitioner's collateral estoppel argument when the government encouraged the Eleventh Circuit to rebuff the argument the way it did. In its brief in that court, the government asserted that it did *not* need to rely on the drug trafficking for which Petitioner was acquitted in 1996 to prove beyond a reasonable doubt the "specified unlawful activity" element of the money laundering charges. 03-10694 Gov't C.A. Br. 26. Because the government did not argue that it *actually* relied on any different evidence at the second trial, the only possible interpretation of the government's argument was to understand it to be contending that its *hypothetical* ability to prove the subsequent charges with different evidence was enough to avoid collateral estoppel.

Having lured the Eleventh Circuit into the holding it issued, this Court should not allow the government now to turn its back on that holding. At a bare minimum, Petitioner respectfully suggests that the

---

[1] The government also suggests that the Eleventh Circuit "may have viewed this case as one in which the prior acquittal did not determine an ultimate issue in the present case." BIO 18 (internal quotation marks and citation omitted). But such a holding would have been nonsensical, which the government apparently recognizes because it declines to defend the idea. It was necessary—an ultimate issue—in this prosecution for the government to prove that Petitioner laundered money derived from drug dealing. Pet. for Cert. 2; Pet. App. 21a n.2.

Court exercise its authority under 28 U.S.C. § 2106 to grant the writ of certiorari, reverse the Eleventh Circuit's judgment, and remand for further proceedings. The situation here is similar to one in which the Solicitor General acknowledges that there might have been error in the reasoning below, but argues that the outcome is nevertheless correct for other reasons. In such instances, this Court has granted, vacated, and remanded cases to permit the court of appeals, "in the first instance [to] pass on the adequacy of [those] reasons." *Alvarado v. United States*, 497 U.S. 543, 544-45 (1990) (per curiam); *see also id.* (stating that it is not "novel" to GVR "where error is conceded but it is suggested that there is another ground on which the decision below could be affirmed"); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991) (same).[2] Because the government implicitly concedes that the Eleventh Circuit's ruling can be justified only on alternative grounds that the court of appeals did not consider, this Court should require the government to try to establish one of those grounds, in the first instance, to the satisfaction of the Eleventh Circuit.[3]

---

[2] Such procedure is all the more warranted in a criminal proceeding. *See Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam) (granting GVR and noting that "[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated").

[3] At a minimum, this Court should hold this case pending its decisions in *Yeager v. United States*, No. 08-67, and *Bobby v. Bies*, No. 08-598, in which this Court will be considering the

In any event, neither of the government's alternative explanations for how the Eleventh Circuit nevertheless reached the correct result withstands scrutiny.

First, the government argues that collateral estoppel is inapplicable because Petitioner fails the first prong of *Ashe*—in other words, it is impossible to ascertain whether the jury in the 1996 trial acquitted Petitioner because he stopped trafficking narcotics by 1980. BIO 21-22. This contention is of no moment here, however, because the Eleventh Circuit "assum[ed]" that the first jury did in fact make such a determination. Pet. App. 23a.

Moreover, the government's characterization of what the jury necessarily decided at the first trial is mistaken. Petitioner presented a single unitary defense at the 1996 trial that he stopped all illicit activities in 1980 after an alleged co-conspirator went to jail and Petitioner himself was sentenced in a state narcotics case. And the only evidence that Petitioner offered showing that he withdrew from the conspiracy related to 1980. The alternative defenses posited by government, including a statute-of-limitation defense predicated on certain kinds of activities before April 10, 1986 falling outside of the limitations period, BIO 21-22 & n.8, were wholly subsumed subparts of that single defense. Because the jury acquitted Petitioner on *all* counts, it must have decided that Petitioner ceased drug trafficking in 1980, not sometime in between 1980 and 1986, and that he never resumed such trafficking. The government's suggestion to the contrary ignores that the statute of limitations defense

---

meaning and scope of *Ashe v. Swenson*'s collateral estoppel rule in great depth.

would have applied only to *some* of the charged counts, not to the substantive importation and distribution offense which dated from mid-1986 onward (*see* BIO 22 n.8; Pet. App. 20a) *within* the statute of limitations period.

Second, the government argues that the 1996 acquittal is not entitled to collateral estoppel effect because it was allegedly the product of obstruction of justice. BIO 22-24. In essence, the government asserts that before giving an earlier acquittal preclusive effect, a court should look behind the jury's acquittal and attempt to discern the reasons the jury reached the decision it did. This argument founders on the facts and the law.

As a matter of fact, the government's citations to the district court's findings lack force because the Eleventh Circuit *overturned* Petitioner's conviction of obstruction of justice through jury bribery, Pet. App. 37a-38a, and the government declined to pursue that charge on remand, BIO 15. It also bears mention that the judge in the 1996 trial—against whom the government has leveled *no* allegations of tampering—granted judgments of acquittal on seven of the charges brought by the government before the case even went to the allegedly tainted jury. Pet. App. 19a.

As a matter of law, courts may not look behind jury acquittals in any event. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978); *see also United States v.*

Scott, 437 U.S. 82, 91 (1978) (courts may not disregard an acquittal, "however mistaken the acquittal may have been"). If, as here, the government believes that a defendant obtained an acquittal through obstructing justice or other illegal means, the government may prosecute the defendant for *that* wrongdoing and, if it obtains a conviction, severely punish him. But the government may not allege malfeasance in the first trial as an end-run around double jeopardy's application to the original charges.

The Seventh Circuit's decision in *Aleman v. Honorable Judges of the Circuit Court*, 138 F.3d 302, 304 (7th Cir. 1998), is not to the contrary. The court of appeals there acknowledged that it may well be impermissible to look behind jury verdicts for the purpose of turning back double jeopardy challenges. *Id.* at 308. The court of appeals held simply that "the highly deferential standard of collateral review leads us to hold that the contrary interpretation—the one adopted by the Illinois courts in this case—is also not unreasonable." *Id.* No court has extended *Aleman* to a case on direct review.

3. The collateral estoppel issue is more than pressing enough to warrant this Court's attention. The constitutional principle embodied by the collateral estoppel doctrine—that the government cannot force defendants down the gauntlet a second time—is "extremely important." *Ashe*, 397 U.S. at 443. And the doctrine comes into play with great frequency; a cursory search on Westlaw reveals that *Ashe* and its progeny have been cited in thousands of reported decisions. To the extent that there recent decisions involving the specific question at issue here are sparse,

the most likely reason is nearly every court has long forbidden what the Eleventh Circuit condoned here. And if government only rarely (and perhaps out of desperation) resorts to a strategy of pursuing subsequent prosecutions based on purely hypothetical explanations for prior acquittals, that makes the practice *more* suspect, not less, and thus *more* in need of review.

This Court should correct the Eleventh Circuit's erroneous rule before it does further mischief. It requires little reflection to appreciate that the government often would like to avoid the effects of prior acquittals—especially when, as here, it is dealing with an individual it is convinced has committed numerous crimes and deserves punishment. This Court should not let the disagreement concerning the import of *Ashe* compound any further.

II. The Continued Vitality of *United States v. Watts* Merits This Court's Review.

The government contends that this Court should forego reviewing the permissibility of sentencing a defendant based on alleged conduct for which the government tried and failed to obtain a valid jury verdict because (1) there is no circuit conflict on the issue; and (2) such sentencing is permissible in any event. Neither of these arguments is convincing.

1. The absence of a circuit split does not diminish the need for review here. When this Court issues a decision that calls a prior precedent into grave doubt, it is customary for appellate courts to abide by the prior precedent until this Court expressly abrogates or overrules it. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203,

238 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (quotation marks omitted). The government acknowledges that this is the situation here, BIO 25-26, 28 for this Court held in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), that sentencing courts could rely on acquitted conduct and *Booker* did not squarely address this issue. So the only issue is whether the continuing vitality of *Watts* is sufficiently important to warrant review. The government does not dispute that it is.

The Sixth Circuit's recent en banc decision in *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), *pet'n for cert. pending* (No. 08-9523), underscores the importance of addressing this issue once and for all. Diving nine-to-six, the en banc court of appeals agreed with an earlier D.C. Circuit opinion "that defendants understandably perceive unfairness when sentencing courts rely on acquitted conduct." *Id.* at 386 (citing *United States v. Settles,* 530 F.3d 920, 923-24 (D.C. Cir. 2008)). But the majority held that it was powerless to do anything about this because it considered *Watts* to be "binding precedent," and it felt that "*Booker* did not alter the *Watts* position on acquitted conduct." *White,* 550 F.3d at 383, 386 (quotation and citation omitted).

2. The Eleventh Circuit's decision is incorrect. The driving force behind *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), is that a jury must be permitted to act as a

"circuitbreaker" in the machinery of justice by refusing to permit increased punishment based on the facts that the government presents to it. *Blakely*, 542 U.S. at 306-07; *see also Booker*, 543 U.S. at 237 (jury must "stand between the individual and the power of the government"). Using acquitted conduct to increase a defendant's punishment – here, by almost ten times what would be permissible based on the jury verdict alone, *see* Pet. for Cert. 2 – is fundamentally inconsistent with that principle.

Even if the government were correct that this principle can give way in the post-*Booker* sentencing world when jury verdicts apply the beyond-a-reasonable-doubt standard (*see* BIO 28) and judges employ merely a preponderance test, that would not salvage the district court's decision here to sentence Petitioner based on a $35 million money laundering conspiracy, for the jury found *by a preponderance of the evidence* that only $15 million was involved. *See* Pet. for Cert. at 6. Nor would it salvage the as-applied Sixth Amendment problem here with relying on acquitted conduct as the only means of rendering a sentence substantively reasonable under the post-*Booker* Sentencing Reform Act. Pet. for Cert. 33-34. The government, in fact, does not even contend that Petitioner's sentence is reasonable apart from the district court's reliance on acquitted conduct.

Even setting aside the Sixth Amendment, the government is incorrect that a sentence is reasonable under *Booker*'s remedial opinion when it relies on acquitted conduct, so long as the court deems the conduct to be "relevant conduct." BIO 29. The concept of "relevant conduct" was born in the Federal

Sentencing Guidelines, not the Sentencing Reform Act. And *Booker*'s remedial opinion measures reasonableness against the factors listed in 18 U.S.C. § 3553(a), which focus on the "the seriousness of the offense," *id.* § 3553(a)(1), not of other allegations for which the jury acquitted the defendant.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce Rogow
BRUCE S. ROGOW, P.A.
500 E. Broward Blvd.
Suite 1930
Fort Lauderdale,
FL 33394

Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
1201 Third Street
Suite 2200
Seattle, WA 98101
(206) 622-3150

April 2009

Counsel for Petitioner